MR. DOWD: Yes, Mr. Chairman. My name is Kelvin Down. I am with the law firm of Slover and Loftus. We are counsel to the Western Coal Traffic League, as well as to various parties to coal rate proceedings before the Board.

I'm going to address very briefly some of the proposals that were put forward by the AAR and the Union Pacific and the Burlington Northern-Santa Fe in their written testimony this week.

We note that none of these proposals have been formally noticed by the Board for public comments under the Administrative Procedures Act, and so we assume that no action would be taken on any of them unless and until the Board decided to specifically notice a proposed change in its rules and invite written comment.

Various changes in the existing rules have been offered by these three parties. As we view them, they're substantive proposals. All appear designed to support higher rates on captive coal traffic by increasing the likelihood of rail carriers prevailing in coal rate cases.

We are also concerned that their proposed procedural changes would tend to bias the regulatory process in their favor and would unnecessarily add to the cost of prosecuting a rate case.

Some of the more significant, as we see them, are, first, the proposal framed by the Union Pacific to limit adjustments to system average costs for variable cost determinations.

Now, as UP frames it, the railroads should have the ability to make adjustments where the costs might be higher than system averages, but long approved adjustments that tend to show lower than average costs in other areas would be eliminated, and naturally the higher the variable costs, the higher captive coal rates.

It's undisputed that unit coal trains are more efficient and less costly on a service unit basis than average

traffic generally, and the Board and the ICC before it have consistently applied adjustments to system average data to reflect these economies.

We are concerned that in the current environment, the carriers' strategy, rather than to continue to rely on movement specific data, has been to deny the existence of movement specific data and increasingly request a default back to system average costs.

The reliability of a particular adjustment to system average cost should be treated as a matter of proof by the Board. We don't see that there is a problem that needs to be addressed in terms of how variable costs are calculated from a procedural standpoint.

If there is a problem in this area, we believe it is from a procedural standpoint. If there is a problem in this area, we believe it is more attributable to the carrier's discovery tactics in trying to deny shippers access to the movement-specific data needed to make these adjustments.

Now, the AAR and Burlington Northern Santa Fe claim that variable costs should only have a role in determining the Board's jurisdiction, and that, therefore, accuracy shouldn't be as much of a priority. But that claim is grounded on the false assumption that stand-alone cost results always should yield rates higher than the jurisdictional threshold, and the agency's decisions time and time again have come to the opposite conclusion.

The Union Pacific also proposes that the Board stop considering forecasts of future traffic and revenues for stand-alone purposes, and instead rely solely on historical trends. The ostensible basis for this change is the alleged unreliability of forecasts. But, again, if there's an issue there, it's an issue of proof, not methodology.

The current practice is to use the railroad's internal business forecasts of future traffic, coupled with either a

reliable private forecast looking beyond the railroad's projection, or a recognized government forecast, such as the forecasts published by EIA.

If the private forecasts are not well supported, the Board tends to reject them in favor of the EIA, or a similar government forecast. The Board is not in the forecasting business, nor should it be. Nothing in the current rules preclude a carrier from arguing that future traffic and revenues for a stand-alone railroad should be based on historic trends.

But if history is not a reliable predictor for the future, if, for example, there is evidence that new coal plants will be coming online in the future, or that an existing coal mine is going to run out of coal, parties and the Board should be able to rely on that specific evidence. BN Santa Fe seeks a formal rule requiring plaintiffs to present what it terms a viable case on opening, and then prohibit changes to that case on rebuttal.

Now our concern is that the first part of their proposal would delay rate cases indefinitely by building another major Board decision into the process -- a Board decision on what would inevitably be a motion to dismiss on the grounds that whatever case was presented on opening, it's not a viable case. And there's no basis in law or regulatory policy for the suggestion the parties shouldn't be able to revise their evidence on rebuttal.

Now, BN seems to be trying to formalize a recent practice it's adopted of moving for preemptive dismissal of cases on the grounds that their consultants think that the shipper's consultants are wrong. But those debates go to the ultimate issues on the merits. They're not a matter for preliminary or preemptive rulings.

It would be akin to granting a ruling for summary judgment while there are still material facts in dispute. There's no support for such a procedure.

There is also no precedent for denying Complainants the right to modify a stand-alone presentation in response to criticisms made by the Defendant without having to adopt all of the Defendant's criticisms.

In cases where parties have tried to actually redo their case on rebuttal, this agency has quickly recognized that and has been very firm in striking the offending evidence. The Board, in our view, has struck a good balance between the rights of shippers to present a complete case, including the right to modify the case as new or better information becomes available, on the one hand, and on the other hand the carrier's right not to be blind-sided by an entirely new case on rebuttal. But we don't see any need for a change in that approach.

Now, among the procedural proposals that have been made are a proposal to limit the number of discovery requests. And I think it's important to note that the discovery requests that are used today have been developed over time through give and take between shippers and carriers. There are now only four railroads that tend to be involved in coal rate proceedings.

They or combinations of them are the Defendants in all of the coal rate proceedings. And in the course of those proceedings, through give and take with the Complainants, the discovery requests have been honed. And in many areas, like maintenance of way data, for example, the requests have to have multiple subparts in order to yield complete data.

Putting a cap on the number of requests, which would inherently be arbitrary, is only going to encourage more open-ended requests in order to reduce the number of subparts. That, in turn, is likely to result in more carrier objections, more motions to compel, and more delay.

We don't see the number of discovery requests as being the problem. We see the pattern and practice of responding to those requests as being a problem.

We also have some serious concerns about the proposal

that has been made to limit data production to one year for variable costs and two years for stand-alone costs in all cases. Now, for one thing, the selected year could be an anomaly that doesn't represent normal operations. For another, where it's appropriate to look at historic trends, a one- or a two-year timeframe is not an adequate sample to trend historic performance.

And the question whether to analyze stand-alone costs on a long-term or snapshot basis was resolved long, long ago, when the railroad's position favoring a long-term analysis was adopted by the ICC. So, you know, in light of the history, the proper course in our view is to continue to leave the question whether a particular data request spans an unreasonably long period of time for resolution by the Board if and when needed on a case-by-case basis. Adopting a blanket rule would do far more harm than good.

Now, the Union Pacific has put forward a proposal to fix an end point for data production at the last full quarter prior to the filing of initial evidence. We think this is a proposal which potentially is workable, so long as it's administered in an even-handed manner.

In other words, if the carriers were required to update their data production through that cutoff date, and then were precluded from introducing evidence from later periods in their case, their approach would be workable, but it would be inequitable in the extreme to release the carriers from the duty to provide discovery after a certain date and then yet let them use data after that date in their case and claim that it's more recent and, therefore, superior.

We don't particularly object to the proposals that have been made to convene staff conferences for discovery disputes or technical conferences if the staff deems a technical conference is necessary. Our only comment there at this stage would be that whatever procedures are discussed, they ought to be designed to,

again, avoid delay.

The AAR has made a suggestion that shippers be required to produce documentation of the absence of competition, a variable cost analysis, and documentation of future coal source and transportation plans along with their complaints. This suggestion is nothing if not bold.

These are the three discovery areas where railroads typically inquire of the coal shipper, and it would be no wonder that railroads would limit their discovery requests if they got all of this stuff upfront.

Essentially, the AAR is proposing that the Defendants should be given their principal discovery in advance, while offering no assurances that the Complainants will receive anything in response to their requests. It's a nice deal if you can get it. But the fact is that all complaints have to be verified and a well-pled complaint will set forth all of the essential facts that entitle the Complainant to relief.

Now, if the Defendant was to be required to submit traffic tapes, transportation contracts, road property investment records, traffic forecasts, fuel consumption data, the various categories of data that are needed by the Complainant, if the carrier were to submit all of that with its answer, then at least the AAR's proposal would have some symmetrical appeal. But as presented, it's horribly one-sided. It would allow the Defendant to jump start its case while raising a motive to stonewall the Complainant's discovery.

Lastly, I just want to comment on the complaint raised by all of the carriers that too much evidence is filed under seal and designated as highly confidential, which they say poses problems for internal review by in-house counsel. We would be very sympathetic if that problem was not largely of their own making.

The reason shippers file evidence under seal is because it relies heavily on railroad data which is produced and almost

invariably designated as highly confidential. In one case, that even included a printout of a page from the Union Pacific's website.

Shippers don't file evidence under seal in an effort to shield it from scrutiny or let their consultants take contrary positions. That's nonsense. The filings are made under seal out of an abundance of caution to ensure that information that the railroads provide that they deem sensitive is not inadvertently disclosed outside the case.

Carriers could make any use they choose of their own data by being more judicious in their wielding of the confidentiality stamp.

CHAIRMAN NOBER: Okay. Well, thank you very much.